No. 89-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR, *et al.*,
Petitioners,

v.

RALPH MORTIER, *et al.*,
Respondents.

BRIEF OF *AMICI CURIAE* VILLAGE OF MILFORD, MICHIGAN, MAYFIELD VILLAGE, OHIO, AND CITY OF BOULDER, COLORADO

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On Writ Of Certiorari To
The Supreme Court Of Wisconsin

BRIEF OF *AMICI CURIAE* VILLAGE OF MILFORD, MICHIGAN, MAYFIELD VILLAGE, OHIO, AND CITY OF BOULDER, COLORADO

The Village of Milford, Michigan, Mayfield Village, Ohio, and the City of Boulder, Colorado, file this brief as *amici curiae* to urge the Court to reverse the judgment of the Supreme Court of Wisconsin and to hold that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") does not preempt all local authority to regulate pesticides. Alternatively, if the Court finds that FIFRA does preempt some aspects of local pesticide regulation, *amici* urge the Court to limit its holding to those local regulatory schemes that revisit determinations that have been made by the federal govern-

ment under FIFRA, thereby preserving local authority to regulate other aspects of pesticide use that are untouched by federal regulation.

INTEREST OF *AMICI CURIAE*

The three *amici* municipalities are filing this brief because each of them has a local pesticide ordinance that has been challenged on federal preemption grounds similar to those raised in this case. However, *amici*'s ordinances differ from the ordinance at issue here in one important respect: none of them seeks to prevent the use of an approved pesticide. Instead, as the descriptions below indicate, they deal principally with assuring adequate public notice of pesticide use and with other matters not regulated by the federal government under FIFRA. They also represent the range of local concerns over pesticides, aside from those dealt with by the Town of Casey ordinance, that are not currently being addressed by federal authorities and that will remain wholly unregulated if the broad view of preemption urged by the respondents prevails.

In 1986, the Village of Milford adopted an ordinance that requires commercial pesticide applicators to inform the Village of the chemical pesticides used in the Village, to pay an annual $15 fee, and to notify the public of pesticide applications in the Village. Village of Milford Ordinance No. 197 (1986) ("Comp." 79).[1] In an action brought by the Professional Lawn Care Association, a group of businesses that provide commercial lawn care services, the district court set aside the Ordinance on the ground that FIFRA preempts all

[1]Where they are not fully set forth in published decisions, the local ordinances discussed in this brief are being lodged with the Court in a separate statutory compilation ("Comp.").

local authority to control any aspect of pesticide use. *Professional Lawn Care Association v. Village of Milford*, No. 89-CV-71439-DT (E.D. Mich. Sept. 15, 1989). The Sixth Circuit affirmed, holding that FIFRA precludes all local pesticide regulation, including local notification schemes. *Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990). On August 31, 1990, the Village of Milford filed a petition for a writ of certiorari, which is still pending. No. 90-382.

In 1987 and 1988, Mayfield Village adopted two ordinances that require all pesticide users to give notice to abutting property owners before pesticides are applied in the municipality. Mayfield Village Code Chapter 763 (Comp. 85). The Professional Lawn Care Association has challenged these ordinances on federal preemption grounds, but the district court has not ruled in the case. *Professional Lawn Care Association v. Mayfield Village, Ohio*, No. 1:89 CV 0867 (N.D. Ohio filed May 8, 1989).

In 1987 and 1988, the City of Boulder, Colorado, enacted two ordinances concerning pesticide use in the City. Ordinance No. 5129 requires pesticide users, excluding commercial applicators, but including those who contract with them for pesticide services, to give prior notice of airborne sprayings to those on adjacent properties, to provide advance notice of indoor pesticide applications to tenants and employees of nonmanufacturing businesses, and to post notices on properties, including lakes and other open bodies of water, where outdoor pesticides have been applied. Comp. 9. Ordinance No. 5083 required commercial pesticide users to provide the City with copies of records of pesticide applications that must be maintained under state law. In addition, all pesticide users, both commercial and non-commercial, were required to (1) report spills or misapplications to the

City Manager and affected property owners and tenants; (2) refrain from transporting, storing, disposing of, or using pesticides in ways that cause injuries or contamination of surface or ground water; (3) refrain from filling tanks used for pesticide applications without a prescribed spacing between the water supply and the tank; (4) use an anti-siphon device for any pesticide application method that connects to the City water system; and (5) refrain from disposing of pesticides into any City sewer, storm sewer, ditch, or lake. Comp. 1. Ordinance No. 5083 also provided for local enforcement of FIFRA's requirements. Comp. 8.

An association of commercial pesticide applicators challenged the Boulder Ordinances on federal preemption grounds. In *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), the court held that FIFRA does not automatically preempt all local pesticide regulation. Accordingly, the district court upheld the local notification requirements of Ordinance No. 5129. However, because the court concluded that local enforcement of federal standards conflicted with FIFRA, it struck down Ordinance No. 5083 on conflict preemption grounds.

Rather than appeal the ruling with respect to Ordinance No. 5083, the City of Boulder re-enacted Ordinance No. 5083 without the provision providing for local enforcement of FIFRA. Ordinance No. 5250 (Nov. 14, 1989) (Comp. 16); Ordinance No. 5266 (Jan. 23, 1990) (Comp. 29). The repeal of the enforcement provision rendered moot the issue of whether FIFRA preempted local enforcement of FIFRA's provisions. However, the pesticide applicators appealed the district court ruling with respect to the public notification ordinance. After hearing oral argument, the Tenth Circuit held that appeal in abeyance pending the outcome of this case. No. 89-1341 (10th Cir. Jan. 16, 1991).

The *amici* municipalities have an interest in this case because the Court's decision will establish the principles that will determine the viability of their pesticide ordinances. If the Court determines that FIFRA leaves all local authority intact, as we argue in Point I, that ruling will apply equally to the Milford, Mayfield Village, and Boulder Ordinances. However, if the Court decides that FIFRA preempts the Town of Casey Ordinance, we argue in Point II that the ruling should extend only to local laws that revisit federal regulation, in which case the Milford, Mayfield Village, and Boulder Ordinances would survive. Because the viability of their ordinances would be jeopardized by a blanket preemption ruling, *amici* file this brief to urge the Court to restrict any preemption ruling to local regulations that directly conflict with federal regulation.

STATEMENT OF THE CASE

Under the tripartite scheme of pesticide regulation in the United States, federal, state, and local governments share responsibility for controlling pesticide use. As the brief of the United States as *amicus curiae* states, "FIFRA establishes a regulatory partnership between federal, state and local governments." U.S. *Amicus* Br. on Petition for Writ of Certiorari, at 13 ("U.S. Br."). In order to understand how the combined efforts of these three regulatory authorities lead to a workable regulatory scheme, it is necessary to review the regulatory initiatives at each level.

A. *Federal Pesticide Regulation.*

The federal role in pesticide regulation is dictated largely by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.* Congress originally enacted FIFRA in 1947 as a labelling statute designed to

eliminate unwarranted manufacturer claims and to require warning statements on product labels to prevent injury to applicators and harm to crops. U.S. General Accounting Office, *Nonagricultural Pesticides: Risks and Regulation* 9 (1986); C. Bosso, *Pesticides & Politics: The Life Cycle of a Public Issue* 53-54 (1987). While FIFRA protected the farmer from adulterated and ineffectual products, it did not require the federal government to protect the public from adverse health or environmental effects of pesticides. C. Bosso, *supra*, at 58.

In 1972, Congress amended FIFRA to take into account an increasing body of scientific evidence indicating that pesticide use poses risks to human health and the environment. *See* Pub. L. No. 92-516, 86 Stat. 996 (1972); H.R. Rep. No. 511, 92d Cong., 1st Sess. 4 (1971). As amended, FIFRA requires the Environmental Protection Agency ("EPA") to determine which pesticides can be safely used and for which purposes. 7 U.S.C. § 136a(c).

Under this scheme, EPA decides whether to register and how to classify a particular pesticide use, based on its review of the scientific evidence of the pesticide's safety and impact on health and the environment. *Id.* § 136a. If EPA determines that a pesticide use will have an adverse effect on human health or the environment that outweighs its benefits, EPA may prohibit that use. *Id.* §§ 136a(c)(5)(C), 136a(c)(6), 136d(b) and 136(bb). Alternatively, EPA may classify a pesticide as a "restricted use" pesticide because its unrestricted application will have unreasonable adverse effects on human health or the environment. *Id.* § 136a(d)(1)(C). Restricted use pesticides may be applied only by certified applicators, or those working under their direct supervision, and may be subjected to additional restrictions. *Id.*

The 1972 amendments also require EPA to review pesticides that were already on the market for adverse health and environmental effects. However, EPA has encountered numerous delays. For example, as of 1986, it had reregistered *none* of the 50,000 pesticides subject to reregistration and had completed its review of none of the 600 pre-1972 active pesticide ingredients. General Accounting Office, *Pesticides: EPA's Formidable Task to Assess and Regulate Their Risks* 3 (1986). In order to accelerate the process, Congress amended FIFRA in 1988 to set deadlines for EPA's data collection and its reregistration of existing pesticides, but even under the 1988 standards, it will be at least the mid-1990's before EPA completes the reregistration process. *See* 7 U.S.C. § 136b.

Pesticide labels play an important role under FIFRA since pesticides may not be used in ways that deviate from the instructions on their labels. 7 U.S.C. § 136j(a)(2)(G). The pesticide label contains information designed to protect pesticide purchasers against fraudulent claims concerning a pesticide's composition, as well as instructions to ensure proper application of the pesticide. *See id.* § 136(p); 40 C.F.R. § 156.10. To ensure that manufacturers are subject to one label requirement for pesticides that may be sold throughout the United States, FIFRA preempts state labelling authority in section 24(b), which provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. § 136v(b).

FIFRA is far less pervasive in other areas of pesticide regulation besides registration and labelling. Thus, FIFRA does not direct EPA to require public notice of pesticide use or its hazards, and EPA has not entered this field on its own. The labels, which are attached to the pesticide container, provide information about the pesticide and its hazards to the

purchaser and often to the applicator, but not to members of the public who will come into contact with the pesticide once it is applied. *See* 7 U.S.C. § 136a(d)(1)(C); 40 C.F.R. § 152.175; *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989).

In addition, while EPA decides whether a pesticide may be marketed, and, if so, for which uses, it does not consider the possible effects of that pesticide use on groundwater contamination in making its determinations. *See* McCabe, *Pesticide Law Enforcement: A View from the States*, 4 J. Env't L. & Litigation, at 35, 42 & nn. 23 & 24, 43 & n.26 (1989). Moreover, other statutes, such as the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642, prescribe an active local role in protecting wellhead areas, drinking water and public water systems, and sole source aquifers from pesticide contamination. 42 U.S.C. §§ 300f(6), 300g-3(e), 300h-6(c) & 300h-7(a)(1).

B. *State Pesticide Regulation.*

FIFRA envisions an active state role in the regulation of pesticides. Thus, FIFRA allows states to assume primary enforcement of pesticide use violations, to conduct inspections, and to certify pesticide applicators. 7 U.S.C. §§ 136f(b), 136g(a), 136i(a)(2), 136w-1. The states are not limited to enforcement of federal law or to implementation of federal certification standards. Instead, FIFRA expressly authorizes additional state pesticide regulation, provided that the state does not undercut federal restrictions on the sale or use of pesticides:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and

> to the extent the regulation does not permit any sale or use prohibited by this Act.

7 U.S.C. § 136v(a). A state may also register certain pesticides for experimental uses or for additional uses to meet special local needs, as long as the EPA has not previously denied, disapproved, or cancelled that particular use. *Id.* §§ 136c(f), 136v(c)(1).

Under this partnership scheme, states have banned the use of federally approved pesticides and have imposed restrictions on pesticides that EPA allows to be used without restrictions. For example, the States of Massachusetts and Wisconsin imposed restrictions on the use of daminozide on apples after EPA determined that it was a carcinogen, but before EPA took action to restrict its use. *See* Mass. Ann. Laws ch. 94, § 192 (1991); Wis. Stat. § 94.707(1m) (1989). Similarly, states have banned or restricted the use of other pesticides that EPA had permitted to be used. *See, e.g.*, Iowa Code Ann. § 206.32 (1989) (chlordane); Md. Agric. Code Ann. § 5-210.5 (1989) (chlordane, heptachlor, aldrin and dieldrin); Minn. Stat. § 18B.115 (1990) (chlordane and heptachlor); Wis. Stat. § 94.707(a)-(b) (1987-1988) (2-4-5 trichlorophenoxyacetic acid and silvex).

Other state laws fill voids in federal pesticide regulation. Many such laws deal with public notification of pesticide use and its hazards. *See, e.g.*, Colo. Rev. Stat. § 35-10-112 (1990); Conn. Gen. Stat. Ann. § 22a-66a (1989); Fla. Stat. § 482.2265 (1989); Iowa Code Ann. § 206.19(3), (3A) & (4) (1989); Md. Agric. Code Ann. § 5-208 (1989); *see also* McCabe, *supra*, at 48 n.50. Similarly, a California voter initiative requires warnings on all products containing carcinogens and reproductive toxins, including products with pesticide residues that have such effects. California's Safe Drinking Water and Toxic En-

forcement Act of 1986, Cal. Health & Safety Code §§ 25249.5-25249.13; *see D-Con v. Allenby*, 728 F. Supp. 605 (N.D. Cal. 1989) (upheld against FIFRA preemption challenge). In addition, the State of Maine requires that grocery stores post signs informing consumers of the pesticides that are applied on produce after harvest. Me. Rev. Stat. Ann. tit. 22, § 2157(14) (1989).

These additional state laws nonetheless leave large areas of pesticide regulation untouched by federal or state law. *See* McCabe, *supra*, at 8. Moreover, some states encourage further local pesticide regulation, *see* Iowa Code Ann. § 206.19(3) (1989) (provides role for municipalities in establishing public notification rules, determining schedules for pesticide applications to minimize harm to people and animals, and reporting infractions and implementation); La. Admin. Code § 12.4 (1989) (allows local notice requirements for certain aerial applications), and others clearly do not preempt such local supplementation. *See, e.g.*, Colo. Rev. Stat. § 35-10-112(3) (1990) (municipalities may impose notification requirements on private individuals, property owners and the general public); La. Rev. Stat. Ann. § 3:3225 (1989) (procedure for establishing local requirements for the sale or application of pesticides).

C. *Local Pesticide Regulation*.

Local governments have entered the field of pesticide regulation to fill gaps in the federal-state regulatory scheme and to address particular health problems suffered by their residents. As the *amicus curiae* brief of the United States recognizes, "a local governmental role furthers the overall structure and purpose of the federal statutory program." U.S. Br. at 15.

FIFRA does not expressly preempt local authority to regulate pesticides. On the contrary, several FIFRA provisions invite local pesticide regulation. Thus, section 22 requires EPA to "cooperate with . . . any appropriate agency of any State or any political subdivisions thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations." 7 U.S.C. § 136t(b); *accord id*. § 136r(b) (requires cooperation with local agencies in formulating and revising national monitoring plan); *id*. § 136r(c) (requires cooperation with local agencies in monitoring activities). Similarly, political subdivisions may inspect the records of pesticide manufacturers and sellers for enforcement purposes, *id*. § 136f(b), which indicates that FIFRA authorizes political subdivisions to conduct at least some enforcement activities. *See* U.S. Br. at 9; *but see COPARR, Ltd. v. City of Boulder*, 735 F. Supp. at 367 (striking down ordinance which permitted the City to enforce FIFRA). In addition, pesticide producers and distributors must notify local officials of the quantities and locations of pesticides whose registrations have been cancelled or suspended. 7 U.S.C. § 136d(g)(1). Moreover, other federal laws that have an impact on pesticide use mandate a local role in the regulatory scheme. For example, the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642, prescribe an active local role in protecting wellhead areas, sole source aquifers, and drinking water from pesticide contamination. 42 U.S.C. §§ 300f(6), 300g-3(e), 300h-6(c) & 300h-7(a)(1).

The range of local pesticide laws under this tripartite system is vast. Some local laws, like the Town of Casey Ordinance, enable the local government to restrict certain uses of federally registered pesticides. Thus, the Casey Ordinance requires commercial pesticide users to obtain a local permit before all aerial sprayings of pesticides and before applications of pesticides by any means on public

lands. Town of Casey Ordinance No. 85-1, § 1.2 (App. C to Petition for Writ of Certiorari, at 6).

Similarly, in 1971, the Town of Huntington, New York, established a pesticide control board that had the authority to restrict or forbid the use of pesticides within the Town. *Long Island Pest Control Ass'n, Inc. v. Town of Huntington*, 341 N.Y.S.2d 93, 72 Misc. 2d 1031 (1973), *aff'd without opinion*, 351 N.Y.S.2d 945, 43 A.D.2d 1020 (1974) (struck down on state preemption grounds). The Town of Wendell, Massachusetts, likewise required pesticide users to submit to a hearing before a pesticide application, after which the Town could impose restrictions on the use of the pesticide. *Town of Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985) (struck down on state preemption grounds, although court indicated that some local laws would have survived). In addition, the Town of Lebanon, Maine, has an ordinance that requires a town meeting vote before pesticides can be sprayed for non-agricultural uses within the Town. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990) (upheld against federal preemption challenge).

In some cases, local governments impose these limitations in their proprietary capacity. Thus, the Village of Franklin Park, Illinois, prohibits the use of chemical substances on trees and shrubs located on publicly owned property or public rights-of-way without the prior written permission of the Commissioner of Public Works, who determines whether the pesticide will adversely affect vegetation, the health and safety of area residents, or the environment. Village of Franklin Park Ordinance No. 8889 MC 29 (1989)(Comp. 41); *see also* Town of Newburgh, Maine Ordinance (1980) (Comp. 72) (prohibiting certain pesticide uses on rights-of-way); Town of Limerick, Maine Ordinance (1988) (same) (Comp. 70). Similarly, the Casey Ordinance requires

permits for pesticide applications on public lands, Casey Ordinance No. 85-1, § 1.2 (1985)(App. C to Petition for Writ of Certiorari, at 6), and the Milford Ordinance mandates postings of pesticide applications in public buildings. Milford Ordinance, § 4 (Comp. 81-82). Some local governments, such as Montgomery County, Maryland, have likewise adopted laws requiring the use of alternatives to toxic pesticides on County property. *See, e.g.*, Montgomery County, Maryland, Resolution No. 11-1859 (1990)(Comp. 76).

Other local restrictions on pesticide use seek to protect the interests of its residents, much in the way that trespass, nuisance, and zoning laws do. Thus, the Town of Salisbury, New Hampshire, adopted an ordinance that prohibited the use of chemical defoliants by individuals other than the owner or those acting with the owner's written consent. *Town of Salisbury v. New England Power Co.*, 121 N.H. 983, 437 A. 2d 281 (1981) (struck down on state preemption grounds). In addition, that ordinance prohibited such pesticide applications altogether, if they destroyed any vegetation that prevents erosion or that produces a useful crop, unless the applicator replaced the vegetation. *Id.*

Another area of repeated local concern is aerial pesticide applications. In 1977, the drift from phenoxy herbicides spread nearly three miles to cover school buses in Mendocino County, California. The public outcry led the Mendocino County voters to approve an initiative banning aerial spraying of certain pesticides, which was subsequently upheld by the California Supreme Court in the face of state and federal preemption challenges. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984) (en banc). The City of Boulder requires prior notice of airborne sprayings to those on adjacent properties because the city council found "that the unique wind condi-

tions in the city cause drift to occur during airborne applications of pesticides and that absent pre-application notification, airborne applications of pesticides constitute a nuisance." Boulder Ordinance No. 5250, § 6-10-1(b) (Comp. 17). The Town of Casey also found that "aerial spraying of pesticides increases the risk of injury or damage to persons, property and the environment, due to the increased likelihood of pesticide drift and pesticide overspray." (App. C to Petition for Certiorari, at 2-3). Out of a similar concern for the adverse effects of drift, the Village of Wauconda, Illinois, required prior notice to abutting neighbors of fogging pesticide applications, and it prohibited pesticide applications when the wind velocity exceeded ten miles per hour. Wauconda Ordinance §§ 7-12-4, 7-12-5(C) (Comp. 58, 63-64, 65-66); *Pesticide Public Policy Foundation v. Village of Wauconda, Illinois*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd without opinion*, 826 F.2d 1068 (7th Cir. 1987) (struck down Wauconda Ordinance on state preemption grounds because Village was not home rule jurisdiction); *see also Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990) (town meeting approval required for certain herbicide sprayings); *Ames v. Smoot*, 471 N.Y.S. 2d 128, 98 A.D.2d 216 (1983) (local law making aerial spraying of pesticides disorderly conduct preempted by state law); Town of New Sweden, Maine, Art. 37 (1990) (Comp. 72) (ban on aerial spraying); Town of Wellington, Maine, Art. 12 (1988) (Comp. 75) (same); Town of Lebanon, Maine Ordinance (1980) (Comp. 69) (same); Town of Rangeley, Maine Ordinance (1989) (Comp. 73) (requiring drift management plan and notification of neighbors for certain aerial applications and banning spraying in specified area); Town of Limerick, Maine Trafton Lake Ordinance (1970) (Comp. 70) (banning certain aerial spraying).

Local governments have been most concerned about

public notification of pesticide applications. Many local governments have adopted laws that require pesticide users to convey information to the public about the pesticide's application and its hazards. Such requirements have been imposed because the federally approved labels that are affixed to the containers do not inform members of the public that an area has been sprayed or that a particular pesticide is hazardous.

Local notification laws take several forms. First, some require commercial pesticide applicators to provide information to the individuals who hire them to apply pesticides. *See, e.g.*, City of Aurora, Illinois, Ordinance No. 090-59, § 21-33 (1990) (Comp. 32); Oak Park, Illinois, Village Code, § 20-10-3 (1989) (Comp. 44); Montgomery County Code, § 33B-2 (1986); Prince George's County Code, § 12-161.4 (1985).[2] In some of these cases, the laws impose obligations on individuals who contract with commercial applicators for pesticide applications to provide further notification of the applications to the public. Boulder Ordinance No. 5129 (Comp. 9, 16).

Second, many local laws require that the pesticide applicators notify neighbors of pesticide applications, while others extend such notice to individuals with particular pesticide sensitivities. Mayfield Village Code ch. 763 (Comp. 78) (notice to neighbors); Boulder Ordinance No. 5129, § 6-10-11 (Comp. 10, 24) (notice to neighbors of airborne sprayings); Wauconda Ordinance, § 7-12-5(C) (Comp. 65-66) (notice to

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[2]The Montgomery County and Prince George County Ordinances are discussed in *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 646 F. Supp. 109 (D. Md. 1986), *aff'd without published opinion*, 822 F.2d 55 (4th Cir. 1987), which invalidated them on federal preemption grounds.

neighbors of fogging applications); Aurora Ordinance No. 090-59, § 21-33(e) (Comp. 37) (notice to neighbors); Town of Rangeley Ordinance (1988) (Comp. 74) (notice to landowners within 500 feet of the perimeter of certain treated areas); Milford Ordinance, § 5(A) (Comp. 82) (notice to individuals who are medically certified as being chemically sensitive to pesticides).

Third, numerous local laws mandate the posting of public notices in areas where pesticides have been applied. Most of these laws apply only to outdoor pesticide applications, Boulder Ordinance No. 5129 (Comp. 9, 24-28); Village of Schaumberg Ordinance No. 2952, § 16-8.1 (1988) (Comp. 56); Montgomery County Code, ch. 33B-3; Prince George's County Code, § 12-161.3, but some also require public notification to the general public of indoor applications in public or commercial buildings. *See, e.g.*, Wauconda Ordinance, § 7-12-5(A) (Comp. 64); Milford Ordinance, §§ 4, 5(B) (Comp. 81-82). Others mandate that notice be given to residents of multiple-unit residential structures, Boulder Ordinance No. 5083, § 6-11-7(a) (Comp. 7, 22-23); Aurora Ordinance, § 21-34(b) (Comp. 38); Oak Park Ordinance, § 20-10-4(B) (Comp. 49), or to employees of nonmanufacturing establishments. Boulder Ordinance No. 5083, § 6-11-7(b) (Comp. 7, 23).

Many of the local laws also require commercial pesticide applicators to pay a nominal fee in order to do business in the jurisdiction and to supply the locality with information about pesticide applications. Thus, the Milford Ordinance calls for an annual licensing fee of $15 and directs commercial pesticide applicators to supply the Village with the names and chemical ingredients of pesticides used in the Village to enable Milford to prepare for, and to inform its residents of, any potential risks presented by the pesticide applications. Milford Ordinance, § 3 (Comp. 81); *accord* Wauconda Ordinance, §§ 7-12-2 & 7-12-3 (Comp. 63). State or federal law generally requires that such records be maintained, and some of the local laws simply require that copies be submitted to the locality. *See* Boulder Ordinance No. 5083, § 6-11-4 (Comp. 5, 20-21, 30); Aurora Ordinance, § 21-33 (Comp. 36-37); Oak Park Ordinance, § 20-10-3 (Comp. 48). In other instances, the local law mandates additional recordkeeping of pesticide applications in order to assist the locality in undertaking corrective measures. *See* Boulder Ordinance No. 5083, § 6-11-5 (Comp. 5-6, 21, 30-31) (spills and misapplications must be reported to the City Manager and to affected property owners and tenants). Neither the notice nor the recordkeeping requirements described above prohibit or restrict the use of any federally approved pesticides or otherwise second-guess determinations made by the EPA or state regulators. Rather, they supplement federal and state regulation by requiring pesticide users to give local governments and local residents important information that they need to protect themselves from the hazards of pesticide applications.

Finally, some local governments have adopted laws that regulate pesticide use in order to protect their water supplies. Thus, the City of Boulder prohibits the disposal of pesticides into city sewers, ditches, and lakes, as well as storage, transport, or disposal practices that contaminate surface or ground water. Boulder Ordinance No. 5083, § 6-11-6(a), (b), (e) (Comp. 6, 21-22, 31). Moreover, the City of Boulder requires the use of an anti-syphon device whenever a pesticide application requires a connection to the city water system, and it has established a minimum distance between any such connection and the pesticides. *Id.* § 6-11-6(c)-(d) (Comp. 6, 21-22). Similarly, the Village of Schaumberg prohibits vehicles carrying chemical spraying materials from using fire hydrant water to fill their tanks and from flushing, dumping, or

disposing of any pesticide residue in Village sanitary sewers, storm sewers, or ditches. Schaumberg Ordinance, § 16-8.3 (Comp. 57); *accord* Wauconda Ordinance, § 7-12-6 (Comp. 67). These laws also do not revisit or conflict with federal regulation under FIFRA since that statute does not deal with surface or ground water contamination, and EPA does not take such contamination into account in its registration decisions. *See* McCabe, *supra*, at 41-42 & n.23.

SUMMARY OF ARGUMENT

FIFRA has not stripped local governments of all authority to regulate matters related to pesticide use. Instead, it "establishes a regulatory partnership between federal, state and local governments." U.S. Br. at 3. Thus, FIFRA's anti-preemption provision, which expressly permits more stringent *state* regulation, negates any inference that Congress intended to leave no room for supplementation by other jurisdictions. In addition, while there is some evidence that Congress entertained the notion of preempting local authority, there is no evidence in the statute or its legislative history that Congress arrived at a final decision to do so. Moreover, preemption of local authority is inappropriate because, as the United States puts its, local regulation "furthers the overall structure and purpose of the federal statutory program." U.S. Br. at 15.

Alternatively, even if there is preemption of *some* local authority, there is no basis for finding preemption of *all* local authority. Rather, any preemption must be limited to those matters that are actually regulated by the federal government because the concerns expressed by the relevant congressional committees favored preemption only of such matters. Thus, those congressional committees sought to avoid local duplication of federal standards and local determinations

that require complex scientific expertise that local governments rarely possess. Since these concerns come into play with local laws that revisit federal registration determinations, but not with those that deal with matters that are left untouched by federal regulators, at most they support only limited preemption of local authority.

ARGUMENT

I. FIFRA DOES NOT PREEMPT LOCAL AUTHORITY.

This Court has refused to find preemption in the absence of "an unambiguous congressional mandate to that effect," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963), particularly where, as here, the federal scheme would supplant state or local health and safety regulation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (historic police powers are not superseded by federal law "unless that was the clear and manifest purpose of Congress"). There is no such clear intent here, let alone one that extends to all local control over pesticides.

As the district court and the concurrence in the court of appeals in the *Milford* case recognized, this issue presents "a very close question," the proper resolution of which is "by no means free of doubt." *Village of Milford*, No. 90-382, Petition for Writ of Certiorari, App. 26a, 28a; 909 F.2d at 935, 941. Thus, it is not surprising that the six courts that have addressed the issue have split evenly on the result. *Compare Central Maine Power Co.*, *COPARR, Ltd.*, and *County of Mendocino*, *with Milford*, *Mortier*, and *Maryland Pest Control Ass'n*. These conflicting results underscore that Congress failed to evince an unmistakable and unambiguous congressional intent to preempt local authority to regulate pesticides.

FIFRA does not expressly preempt local authority because it contains no explicit restrictions on the authority of local governments to regulate pesticides. Indeed, the only express preemption provision in FIFRA is limited to labelling authority. 7 U.S.C. § 136v(b). Since Congress adopted an express preemption provision, but confined it to labelling authority, the Court should not imply any greater preemption than that prescribed by Congress when it directly considered the issue of preemption, unless it is impossible in a particular case to comply with both the federal and the local requirement.

Congress further underscored its intent to give FIFRA only a limited preemptive effect in the statute's "anti-preemption" provision, which expressly authorizes supplemental state regulation. 7 U.S.C. § 136v(a). While this provision does not speak directly to local authority, it shows that Congress did not intend the federal government to occupy the field of pesticide regulation completely and that supplemental regulation would further, rather than undermine, federal interests. Because of this provision, a state could pass any of the ordinances adopted by the *amici* municipalities, and thus the only question is whether Congress disabled the municipalities from also dealing with these issues.[3]

The anti-preemption provision serves two related purposes. First, it makes it clear that Congress did not intend to occupy the field or to forbid state requirements that are stricter than EPA's, thereby negating any possible argument that Congress intended to preempt state authority in this

[3]Because section 136v(a) authorizes rather than preempts supplemental state regulation, FIFRA's failure to include local governments within its definition of "state" does not answer the question before the Court.

area. *National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465, 469 (E.D. Calif. 1980); *County of Mendocino*, 36 Cal.3d at 491; *accord California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 281-82 (1979) (plurality opinion); *id.* at 295-96 (Scalia, J., concurring). Second, section 136v(a) limits EPA's power to adopt regulations that preempt states from supplementing federal pesticide regulation, which EPA would otherwise have the power to do. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). Since local governments are not the direct beneficiaries of the anti-preemption provision, it does not answer the question of whether some local authority may be preempted by implication.

Implied preemption can arise in three circumstances: (1) where the federal scheme is so pervasive that it leaves no room for supplementation; (2) where the local regulation stands as an obstacle to accomplishment of the federal purposes; or (3) where there is a conflict between a particular local and federal regulation. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). The first basis is inapplicable because FIFRA does not completely occupy the field of pesticide regulation but instead leaves much to the states and specifically invites a local role in a number of areas. *See supra* at 7-8, 10-11. The second basis is also unavailing because local regulation poses no serious obstacle to the accomplishment of FIFRA's purposes. Indeed, the United States takes the position that "a local governmental role furthers the overall structure and purpose of the federal statutory program." U.S. Br. at 16. Finally, it is inappropriate to issue an across-the-board preemption ruling on the basis of conflict preemption. Rather, the Court should determine whether a specific local provision makes compliance with the federal requirement impossible

by reviewing the particular conflict, especially where, as here, the statute tolerates a great deal of conflict by expressly allowing more stringent state regulation. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 486 (1990).

Instead of relying on one of the traditional bases for implied preemption, the supporters of broad preemption argue that the Court should infer a congressional intent to preempt all local pesticide ordinances from the debates leading to the passage of the 1972 FIFRA amendments. However, the only evidence of a such an intent is found in a few statements favoring preemption that represent no more than one side of a congressional debate that was never definitively resolved one way or the other.

The bill passed by the House, where those amendments originated, would have authorized supplemental state regulation of restricted but not general use pesticides. H.R. 10729, § 24(a), *in* H.R. Rep. No. 511, 92d Cong., 1st Sess. 64 (1971). The report of the House Committee on Agriculture describes why the Committee rejected a variation of this authorization provision:

> The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions.

H.R. Rep. No. 511, *supra*, at 16.

After the House passed the bill, the Senate Committee on Agriculture and Forestry agreed that local governments should not supplement state and federal pesticide regulation. S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972

U.S. Code Cong. & Admin. News 3993, 4008. In addition to endorsing the reasons given by the House Committee, the Senate Committee also emphasized that "few, if any, local authorities whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments." *Id.* The Committee also suggested that local regulation would impose undue burdens on interstate commerce, but it never explained the nature of such burdens or how this rationale differs from those previously mentioned. *Id.*

The Senate Committee on Commerce, which also had jurisdiction over the bill, proposed numerous amendments, including one that would have expressly permitted local governments to regulate the sale and use of pesticides. S. Rep. No. 838, *supra*, 1972 U.S. Code Cong. & Admin. News 4023, 4026. Adhering to its original position, the Senate Agriculture Committee rejected this amendment and reported its version of the bill. *Id.* at 3993, 4029.

Objecting vigorously to the Agriculture Committee's bill, Members of the Commerce Committee threatened a floor fight. In order to avert such a battle, the Chairman of the Agriculture Committee re-referred the bill to the Commerce Committee for its consideration. 1972 U.S. Code Cong. & Admin. News 4027-29, 4086-88; *see generally* C. Bosso, *supra*, at 171. After holding hearings, the Commerce Committee reported the bill with a series of amendments, including one that would have expressly permitted local governments to exercise regulatory authority over pesticides. S. Rep. No. 970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4111-12. The Agriculture Committee then issued a supplemental report laying out its opposition to the Commerce Committee's amendments,

including the one authorizing local regulation. S. Rep. No. 838, *supra*, 1972 U.S. Code Cong. & Admin. News 4023, 4026, 4066. In order to resolve the major differences between the two bills, the two subcommittee chairmen spent two months ironing them out. *Id.* at 4086-88; C. Bosso, *supra*, at 171-72.

These negotiations produced a compromise bill that expressly resolved many of the disputes, but not the one pertaining to local authority. On this matter, the explanation of the compromise stated only that "Commerce Committee amendment ... 10 (authority of local governments to regulate the use of pesticides) ... [is] not included in the substitute." 1972 U.S. Code Cong. & Admin. News at 4089, 4091. The explanation did not adopt the gloss placed on the anti-preemption provision by the Agriculture Committee's report language, which would have excluded local authority. Nor did it endorse the Commerce Committee's desire to continue such authority.

Thereafter, the full Senate considered the measure. During the course of the Senate's deliberations, Senator Allen, the chairman of the pertinent subcommittee of the Agriculture Committee, inserted the joint explanation of the compromise bill and the Agriculture Committee's initial report into the Congressional Record. 118 Cong. Rec. 32,252, 32,256, 32,257-58 (1972). While the Agriculture Committee's report contained the committee's views on preemption of local authority, Senator Allen did not highlight this discussion in any way. The Senate then voted on the bill without any discussion of the content of these reports or the effect of the compromise bill on the authority of local governments. *Id.* at 32,263. Since there was no local preemption language in the bills adopted by either the House or the Senate, the House-Senate conference made no statement regarding the effect of the bill on local authority. H. Conf. Rep. No. 1540, 92d Cong.,

2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4130.

It is impossible to glean any single congressional intent from this legislative history, much less one that is clear, manifest, and unambiguous, as is required for a finding of implied preemption. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 146-47. To the contrary, the public record demonstrates that Congress did not definitively resolve the dispute over whether to authorize or preempt local regulation of pesticides. In other words, the two Senate committees agreed to disagree, leaving the matter up in the air. There can be little question that "[c]ommittee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J. concurring) (citations omitted). Therefore, neither the statute itself nor its legislative history evinces a clear enough intent to warrant a finding of preemption of all local authority.

II. ANY EVIDENCE OF A CONGRESSIONAL INTENT TO PREEMPT LOCAL AUTHORITY EXTENDS ONLY TO MATTERS THAT ARE ACTUALLY REGULATED BY THE FEDERAL GOVERNMENT.

Not only is the evidence of a congressional intent to preempt local authority far too meager to support such a finding, but, even if it were clearer, it would not support a finding that *all* local pesticide regulation is preempted. Instead, what congressional intent exists supports preemption of only those matters that are actually regulated by EPA under FIFRA.

In deciding whether a particular field has been fully occupied by the federal scheme, this Court has carefully analyzed the extent of federal regulation and the reasons why Congress favored excluding states or localities from the field. Based on this analysis of the statute and its purpose, the Court has narrowly defined the preempted field, and struck down only those regulations that undermine the federal scheme. *See, e.g., Hillsborough County*, 471 U.S. at 717-18 (the mere existence of comprehensive federal regulation does not automatically preempt state and local supplementation).

Thus, in *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 205, 212-13 (1983), the Court held that the Atomic Energy Act occupied only that portion of the field of nuclear power regulation that is based on radiological safety, leaving states free to regulate in pursuit of other interests, even where the state regulation has an incidental effect on safety. Furthermore, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-56 (1984), the Court held that the preempted field of nuclear safety regulation did not bar state punitive damages awards, even where the defendant had complied with federal safety standards, because there is no irreconcilable conflict between the two and because state punitive damages awards would not frustrate the purposes of the federal law. Just last Term, the Court again rejected a claim that all state regulation bearing some relation to the field of nuclear safety is preempted by the Atomic Energy Act. *English v. General Electric Co.*, 110 S. Ct. 2270 (1990). Instead, the Court concluded that a state infliction of emotional distress lawsuit was not preempted because it had only a remote connection to the preempted field of nuclear safety. *Id.* at 2277-78.

Against this backdrop, if the Court finds some implied preemption, it should limit FIFRA's preemptive effect to the

field that it actually occupies -- pesticide registration. Thus, the federal government (in conjunction with the states in some instances, *see* 7 U.S.C. § 136v(a)) decides which pesticides can be sold and used, for which purposes, and with what restrictions. Given the cost and complexity of such determinations, only a small portion of local pesticide laws, such as local bans on the use of particular pesticides or local permitting decisions that have the same effect, revisit these determinations, and thus only those laws would be preempted on the ground that they enter this field or conflict with federal regulation. Most other local laws, such as public notice ordinances and record requirements, will have at most an incidental effect on federal pesticide regulation. Accordingly, under this Court's precedents, there is no basis for finding preemption of local public notice, recordkeeping, or groundwater regulations on the ground that the federal government has occupied that field or that the local regulations conflict with, or are inconsistent with, federal law. *See North Dakota v. United States*, 110 S. Ct. 1986, 1997-98 (1990) (federal liquor procurement law designed to ensure lowest prices does not preempt state reporting and labeling requirements because they have only an incidental effect on cost).

The concerns that animated the proponents of local preemption in 1972 also support only limited preemption. The principal reason, given by both the House and Senate Agriculture Committees, was that the fifty states plus the federal government would provide an adequate number of regulatory jurisdictions. H.R. Rep. No. 511, *supra*, at 16; 1972 U.S. Code Cong. & Ad. News at 4008. That rationale would apply only where the federal government had actually taken some regulatory action. The second concern was that local governments would be incapable of making judgments that require scientific expertise that they do not have and cannot afford to acquire. 1972 U.S. Code Cong. & Ad. News at 4008.

This concern applies only to the very few local regulations that require complex scientific determinations, such as banning or restricting the use of a pesticide.

Under these rationales, local governments would be precluded from making registration decisions -- the core activity of EPA under FIFRA. Thus, local laws that ban or restrict the use of certain pesticides would be preempted, although local governments could still impose limitations in their proprietary or contracting capacity on pesticide use on public lands, in public buildings or pursuant to local government contracts. *See supra* at 11-12.

In any event, neither the desire to avoid local duplication of federal and state standards, nor the concern that local governments lack scientific expertise, would support preemption of most other forms of local regulation. For example, laws restricting aerial spraying do not ban the use of a federally registered pesticide, but rather control its application in order to address drift problems resulting from local weather conditions and geography. Accordingly, they will rarely duplicate federal standards, and whatever scientific expertise they require is readily available to the local government and, because of its uniquely local nature, is less likely to be in the hands of the EPA.

Local public notification requirements are even further removed from the articulated congressional concerns. There is nothing in the 1972 legislative history to suggest that Congress was concerned about local notice regulations. FIFRA is silent with respect to public notice, and the EPA has never adopted any such requirements. Thus, local notification laws neither duplicate federal regulation nor require scientific expertise. Moreover, they impose no more of a burden on interstate commerce than hundreds of other local conditions

of doing business in many jurisdictions.

Local record requirements involve even less scientific expertise and redundancy, particularly since most of them simply direct pesticide users to supply copies of federally or state mandated records to the locality. Moreover, since FIFRA itself allows local governments to inspect such records, 7 U.S.C. § 136f(b), and in some cases, requires pesticide users and distributors to provide information to local governments, *id.* § 136d(g)(1), such local record requirements dovetail, rather than conflict, with FIFRA's requirements.

Local regulations that are designed to prevent contamination of ground or surface water are also far afield from federal registration decisions. Often they impose restrictions on the use of the municipal water supply or sewer system. Certainly, local governments can impose restrictions on the use of city services. Moreover, any notion of implied preemption by FIFRA would be negated by the expressed federal desire for a local role in preventing surface water contamination expressed in the Safe Drinking Water Act Amendments of 1986. *See supra* at 8.

A blanket preemption ruling would preclude local regulation of a wide range of other matters that have, at most, an incidental effect on federal regulation under FIFRA. For example, it would prohibit local rules that bar the application of pesticides in schools and child care facilities when children are present, or that require landlords to notify tenants before spraying pesticides in common areas. It might even bar local governments from closing food establishments that serve food contaminated by rat poisoning, or from mandating that trucks refrain from carrying open containers of pesticides on residential streets. Local governments might also be pre-

cluded from requiring separate garbage pickups for pesticide containers to ensure that pesticide residues do not contaminate municipal dumps or seep into ground water. Certainly, there is no basis to conclude that Congress intended to curtail all local regulation that concerns the use of pesticides in some way. Instead, for preemption to occur, the local regulation must, at the very least, involve a matter that is actually regulated or specifically exempted from regulation by the federal government under FIFRA. Under that test, *amici*'s ordinances must be upheld.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Supreme Court of Wisconsin and hold that FIFRA does not preempt local authority or, alternatively, that FIFRA preempts only those local laws that revisit determinations actually made by the federal government.

Respectfully submitted,

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